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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, *et al.*,

Petitioners,

v.

JOHNSON CONTROLS, INC.

Respondent.

On Appeal From The United States Court Of Appeals For The Seventh Circuit

BRIEF *AMICUS CURIAE* OF CONCERNED WOMEN FOR AMERICA IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS CURIAE

Concerned Women for America, ("CWA") is a national, non-profit organization representing approximately 600,000 people. CWA's purpose is as follows:

> To preserve, protect and promote traditional Judeo-Christian values through education, legal defense, legislative programs, humanitarian aid, and related activities which represent the concerns of men and women who believe in these values.

CWA is concerned with the unwarranted employment discrimination against women, as well as the health and well-being of children, both born and unborn. The child protection policy at issue in this case is very important in an industry which has demonstrated ill-effects on unborn children due to prenatal exposure to lead. CWA believes that Title VII of the Civil Rights Act of 1964 was broadly enacted to proscribe discrimination in employment, but that it is not so broad as to prohibit employers from adopting policies which protect unborn children from work-place hazards. Based upon the record in this case, Concerned Women for America supports the child protection policy at issue and urges this Court to affirm the ruling of the Seventh Circuit Court of Appeals. 886 F.2d 871 (7th Cir. 1989).

ARGUMENT

I. EMPLOYER POLICIES WHICH PROTECT UNBORN CHILDREN FROM BIRTH DEFECTS, BUT APPLY DIFFERENTLY TO WOMEN THAN MEN, ARE CONSISTENT WITH TITLE VII

At issue in this case is whether under Title VII of the Civil Rights Act of 1964 an employer may adopt a policy which protects unborn children from birth defects due to workplace hazards when the policy treats women differently from men. Child protection policies like the one in

this case do not violate Title VII because, as the legislative history indicates, they are not the type of employer decisions, that the legislation was enacted to prohibit.

A. Title VII Prohibits Only "Arbitrary And Unnecessary" Discrimination, And Not All Differential Treatment Of People.

Title VII of the Civil Rights Act of 1964,[1] did not prohibit all discrimination in employment but was enacted to remove "artificial, arbitrary, and unnecessary barriers to employment . . . ." *Dothard* v. *Rawlinson*, 433 U.S. 321, 328 (1977). Title VII prohibits discrimination "because of" or "on the basis of sex." The legislative history is virtually silent as to what Congress meant by this language, because "sex" was added as a protected category late in the congressional deliberations and the amendment was passed without any hearings.[2] Consequently, what "sex discrimination" was prohibited is not absolutely clear and it has fallen to the courts to give this language meaning. This Court has determined that employment decisions distinguishing between men and

[1] 42 U.S.C. § 2000e-2, § 703 (a)(1) reads:

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

[2] It is generally known that "sex discrimination" was added late in the deliberations by an opponent of the bill in an effort to defeat the legislation. 110 Cong. Rec. 2577 (1964) (remarks of Rep. Smith); *id.* at 2581-82 (remarks of Rep. Green). *See Prenatal Exposure to Fetally Toxic Work Environments: The Dilemma of the 1978 Pregnancy Amendment to Title VII of the Civil Rights Act of 1964*, 66 Iowa L. Rev. 63, 74 n.54 (1980).

women will be prohibited under Title VII if they are based on stereotyped characterizations of men and women.

> [E]mployment decisions cannot be predicated on mere "stereotyped" impressions about the characteristics of males or females. [Citation omitted]. Myths and purely habitual assumptions about a woman's inability to perform certain kinds of work are no longer acceptable reasons for refusing to employ qualified individuals, or for paying them less.

Los Angeles Dep't of Water & Power v. *Manhart*, 435 U.S. 702, 707 (1978); *see also Dothard* v. *Rawlinson*, 433 U.S. 321 ("the federal courts have agreed that it is impermissible under Title VII to refuse to hire an individual woman or man on the basis of stereotyped characterizations of the sexes, . . .") *Id.* at 333-34.

Pregnancy Discrimination Act ("PDA")

Similarly, in 1978, when Congress passed the Pregnancy Discrimination Act ("PDA") clarifying the meaning of sex discrimination as including discrimination "because of or on the basis of pregnancy, childbirth, or related medical conditions,"[3] the overwhelming purpose of the legislation was to prohibit employment discrimination based on stereotyped characterizations of women because of pregnancy—the assumption that merely because women bear children they are marginal workers.[4] In

[3] 42 U.S.C. § 2000e (k), § 701(k).

[4] "As testimony received by this committee demonstrates, the assumption that women will become pregnant and leave the labor force leads to the view of women as marginal workers, and is at the root of the discriminatory practices which keep women in low-paying and dead-end jobs." H.R.Rep. No. 948, 95th Cong., 2nd Sess., *reprinted in* 1978 U.S. Code Cong. & Admin. News 4749, 4751.

"The assumption that women will become pregnant and leave the labor market is at the core of the stereotyping resulting in unfavorable disparate treatment of women in the workplace." 123 Cong. Rec. 29662 (daily ed. Sept. 15, 1977) (statement of Senator Cranston).

enacting the PDA, Congress was concerned that women not be penalized for becoming pregnant and not lose their jobs simply because an employer thought a pregnant woman could not, or would not, perform the job.

The vast majority of the PDA's legislative history is given to the discussion of 1) overturning this Court's decision in *General Elec. Co.* v. *Gilbert*,[5] where the Court found that denying fringe benefits to pregnant women did not constitute sex discrimination in violation of Title VII, 2) the cost to the employer of implementing this legislation, and 3) whether abortion must be paid for as a "medical related condition."[6] The thrust of the PDA was to ensure that a pregnant women's benefits were equal to those of her co-workers, so that employers could not use benefit plans as instruments to force women out of the workplace because of the employer's stereotyped belief that women were marginal workers.[7]

---

[5] 429 U.S. 125 (1976). The references to *Gilbert* in the legislative history are extensive. *See Prenatal Exposure to Fetally Toxic Work Environments*, 66 Iowa L.-Rev. at 79 n. 76 (1980, *citing* legislative history); *see also, Newport News Shipbuilding & Dry Dock* v. *EEOC*, 462 U.S. 669, 678 (1983).

[6] The PDA does not require an employer to provide health insurance benefits for abortion except "where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion." 42 U.S.C. § 2000e (k). If, under the PDA, an employer is able to consider the unborn child in the circumstance of abortion, how much more so, in a policy that protects the unborn child from birth defects after it is born.

[7] "The purpose of the bill is to insure that women who are disabled by conditions related to pregnancy are compensated fairly and given a fair amount of assistance with their medical bills, in relation to their fellow employees who are disabled by other medical conditions." 123 Cong. Rec. 29386 (daily ed. Sept. 15, 1977) (statement by Senator Williams, sponsor of the Bill).

"We can set right the injustice of unequal health protection for male and female employees by passing S. 995. This amends Section 701 of the Civil Rights Act of 1964 by providing that employers who offer disability benefits must offer them to cover pregnancies." 123 Cong. Rec. 29388 (daily ed. Sept. 15, 1977) (statement of Sen. Kennedy, co-sponsor of the Bill).

[8] Br. of Equal Rights Advocates, et al., at 1.

Title VII, as amended by the PDA, was meant to address the general problem of prohibiting women from the work force because of myth or negative stereotypes, and was never intended to have any effect on an employer's decision to adopt policies which would protect unborn children from workplace hazards.

Toxic Workplaces

Some of the amici have wrongly posited that Congress was "fully informed" that the PDA would prohibit a policy of refusing work to a pregnant woman because of the risk either to her or her child and that Congress "enacted the PDA without change and with full understanding of its reach."[8] In light of the vast hearing record and legislative history on the PDA dealing with health benefits and generalized discrimination against women, this conclusion is unwarranted.

While the legislative history indicates that some mention was made of employers' concerns about toxic workplaces, these passing references must be put in perspective. Subcommittees of the House and the Senate held hearings over a five day period, compiling over 1000 pages of statements and testimonies, not including the hundreds of pages of legislative history created outside of the hearings. Of nearly 1200 pages of deliberation on this

bill, there were two references to the effects of a toxic work environment on pregnant women and their children.

The United States Chamber of Commerce made the first reference in a prepared statement submitted to both the House and Senate Committees. The Chamber of Commerce interpreted the PDA to prevent employers from refusing work to pregnant employees where such work, "*arguably*" posed a threat to the health of either the woman or her unborn child.[9] While that may be true, that is not the case before this Court. The threat posed to the unborn child by prenatal exposure to lead is definite. The court of appeals found "overwhelming evidence . . . that an unborn child's exposure to lead creates a substantial health risk involving the danger of permanent harm." *International Union, UAW* v. *Johnson Controls*, 886

[9] The Chamber of Commerce statement reads in part:

> S.995 could present job health problems. For example, it requires that "women affected by pregnancy, childbirth or related medical conditions shall be treated the same for all employment related purposes." This would prevent an employer from refusing certain work to a pregnant employee where such work arguably posed a threat to the health of either the mother-to-be or her unborn child. Even though the prospective mother might arguably be considered to have assumed the risk by asking to work in such circumstances, injury to the fetus might give the child a cause of action against the employer who, under the bill, would be powerless to deny the work to the child's mother during the pregnancy.

Discrimination on the Basis of Pregnancy, 1977: Hearings on S. 995 Before the Subcomm. on Labor of the Sen. Comm. on Human Resources, 95th Cong., 1st Sess. 482 (1977) [hereinafter "Senate Hearings on S. 995"]; *Legislation to Prohibit Sex Discrimination on the Basis of Pregnancy: Hearing on H.R. 5055 and H.R. 6075 Before the Subcomm. on Employment Opportunities of the House Comm. on Education and Labor*, 95th Cong., 1st Sess. 84 (1977) [hereinafter "House Hearings on H.R. 5055 and H.R. 6075"]. A representative for the Chamber of Commerce gave oral testimony to the same effect at the House hearings.

F.2d 871, 883 (7th Cir. 1989). If the threat posed to the unborn child is arguable, then a policy protecting the child may be unnecessary and might violate the PDA. But a threat that is definite makes the policy necessary and is not proscribed by the PDA.

The only other reference was in a brief exchange between Senator Hatch and an expert witness testifying before the Senate Subcommittee. The witness basically encouraged that more research be conducted on the effects of industry hazards to all employees and their unborn children, and not just to women.[10]

Out of nearly 1200 pages of statements, testimony and legislative history, these two references appeared on a total of four pages.[11] Four pages of 1200. It can hardly be said that Congress was "fully informed" or even on notice that the reach of the PDA might prohibit an employer from adopting policies which protect unborn children from hazardous workplaces.

[10] SENATOR HATCH: Do you think there would arise a whole slew of OSHA problems occupational, safety and health problems as a result of pregnant women?

> DR. HELLEGRES: Let me put it this way: I have long been an advocate for a massive increase in research to deal with the effects of poisons, chemicals, physical or other agents on pregnant working women. However, two other things: Those agents are just as likely to affect the ovaries of nonpregnant women and there are in fact today companies that will not hire women on that specific basis.
>
> But you never dream of thinking that the same agents may also affect the testicles of men. So if we are talking about untoward effects of industrial processes on human procreation, we have to look at the effects on testicles, the effects on ovaries, and the effects on fetuses, all three, and we aren't doing much of that.

Senate Hearings on S. 995, at 67.

[11] *Senate Hearings on S. 995*, at 67, 482; *House Hearings on H.R. 5055 and H.R. 6075*, at 84, 88.

B. Employer Policies Which Protect Unborn Children From Birth Defects Are Not Arbitrary Or Unnecessary In Manufacturing Processes Which Expose Women To Airborne Lead.

Title VII, as amended by the PDA, struck at the negative stereotype that women were marginal workers who would leave the work force simply because they could have children. These beliefs potentially kept women out of *all* jobs. It is this fact that illuminates why the application of the child protection policy in this case does not violate Title VII.

First, it is not a policy which seeks, because of myth or stereotype, to keep women out of the work place or in low paying jobs. The purpose of the policy is to protect unborn children from the very real and documented effects of prenatal exposure to lead. The lower court found after reviewing the record that "overwhelming evidence . . . establishes that an unborn child's exposure to lead creates a substantial health risk involving a danger of permanent harm." *Johnson Controls*, 886 F.2d at 883. That unborn children are affected by in utero exposure to lead is a medically-proven fact.

It is also a fact that, as this Court has stated, "[t]here is a natural difference between men and women: only women have the capacity to bear children." *Hodgson* v. *Minnesota*, 58 U.S.L.W. 4957, 4961 (U.S. June 26, 1990). In the area of constitutional law, this Court has "consistently upheld statutes where the gender classification is not invidious, but rather realistically reflects the fact that the sexes are not similarly situated in certain circumstances." *Michael M.* v. *Sonoma County Superior Court*, 450 U.S. 464, 469 (1981) (upholding California statutory rape law under which men alone may be criminally liable for an act of sexual intercourse).

This Court also upheld a federal statute which subjected male naval officers who were not promoted within a

certain period of time, to mandatory discharge while not subjecting female naval officers who were not promoted within the same period to discharge. *Schlesinger* v. *Ballard*, 419 U.S. 498 (1975)[12] ("In contrast [to cases where gender classifications were based on overbroad generalizations], the different treatment of men and women naval officers . . . reflects, not archaic and overbroad generalizations, but instead, the demonstrable fact that the male and female line officers in the Navy are *not* similarly situated with respect to opportunities for professional service." *Id.* at 507-08. There are real differences between men and women and these differences do not simply disappear because a case is brought under Title VII. The policy at issue in this case focuses on this "natural difference" between men and women. There is no myth; there is no stereotyping.

Second, this policy does not preclude women from working in *all* jobs, but only those which expose their unborn children and future children to the industry dangers.[13] We acknowledge that there are and will be jobs

[12] *See also*, *Parham* v. *Hughes*, 441 U.S. 347 (1979) (opinion, Stewart, J. "In cases where men and women are not similarly situated, however, and a statutory classification is realistically based upon the differences in their situation, this court has upheld its validity.") *Id.* at 354-55.

[13] Johnson Controls' child protection policy prevents women who are capable of bearing children from working in jobs where there is a likelihood that their blood lead levels will rise above 30 ug/dl. *See Johnson Controls*, 886 F.2d at 876.

Initially, the child protection policy applied to jobs in "lines of progression" which contained high-risk positions. But it has been noted in *Respondent's Brief in Opposition*, that after the case went to the Seventh Circuit, Johnson Controls revised its policy eliminating the "lines of progression" provision. The policy is now applied even more narrowly, on an individual job-by-job basis. *Id.* at 8 n. 16.

It should also be noted that Johnson Controls revised its policy from 30 to 25 micrograms in accord with the Center for Disease Control's current maximum lead level for umbilical cord blood. *Id.*

closed to women because of the child protection policies,[14] but that fact does not end the inquiry.

Title VII is a balancing of interests, and the standard adopted by the federal courts of appeals and the EEOC (*see* p. 21, *infra*), correctly weighs the competing interests. If no evidence sustains the employer's policy, then in Judge Posner's words, "I do not see why we should want to save it from condemnation under Title VII." *Johnson Controls*, 886 F.2d at 904 (Posner, J., dissenting). But on the other hand, if sufficient evidence sustains the employer's policy, and both the District Court and the Court of Appeals found it so, the policy should be upheld. The child protection policy at issue in this case is not artificial, arbitrary, or unnecessary. It is not based on myth or stereotype and does not violate Title VII.

II. EMPLOYER POLICIES WHICH PROTECT UNBORN CHILDREN FROM BIRTH DEFECTS, BUT APPLY DIFFERENTLY TO WOMEN THAN MEN, SATISFY THE TITLE VII EXCEPTION FOR BONA FIDE OCCUPATIONAL QUALIFICATIONS

Not only are child protection policies consistent with the purpose of Title VII to prohibit artificial, arbitrary or unnecessary discrimination, but they also satisfy the Title VII exception to employment discrimination. Title VII prohibits discrimination in employment that is artificial, arbitrary or unnecessary, but recognizes that in some situations specific classifications will be appropriate. Employers are therefore provided with an exception to

[14] *See Firing the Woman to Protect the Fetus: The Reconciliation of Fetal Protection with Employment Opportunity Goals under Title VII*, 69 Geo. L.J. 641 (1981) (noting that "at least 100,000 jobs are closed to women because of policies barring fertile women from hazardous jobs.") *Id.* at 647.

classifications based on sex, religion or national origin when the classification is a "bona fide occupational qualification [BFOQ] reasonably necessary to the normal operation of that particular business or enterprise." 42 U.S.C. § 2000e-2 (e).

Even though the federal courts of appeals and the EEOC have varied on the defense applicable in cases involving gender-based child protection policies (some apply a business necessity/disparate impact standard while others require a BFOQ standard), all have come to the same conclusion that child protection policies are permitted under Title VII.[15]

When this Court has addressed gender classifications under Title VII, it has applied the BFOQ defense. *See Dothard*, 433 U.S. 321 (1977) (regulation prohibiting women from working in contact positions at all-male prison); *Phillips* v. *Martin Marietta Corp.*, 400 U.S. 542 (1971) (policy barring women with school-aged children from employment). But this Court has also noted that "Congress recognized that classification based on . . . sex . . ., may sometimes serve as a necessary proxy for neu-

[15] *International Union, UAW* v. *Johnson Controls, Inc.*, 886 F.2d 871 (7th Cir. 1989) (en banc) (employer's policy sustained under either business necessity or BFOQ defense); *Hayes* v. *Shelby Memorial Hosp.*, 726 F.2d 1543 (11th Cir. 1984) (business necessity defense); *Wright* v. *Olin Corp.*, 697 F.2d 1172 (4th Cir. 1982) (business necessity defense); *Policy Statement on Reproductive and Fetal Hazards Under Title VII*, *reprinted in* Fair Empl. Prac. Manual (BNA) (Oct. 3, 1988) (recognizing a per se violation of VII but applying business necessity defense). The Commission's position changed in *Policy Guide on United Auto Workers* v. *Johnson Controls*, *reprinted in* Fair Empl. Prac. Manual (BNA) (Jan. 24, 1990) to require a BFOQ defense while maintaining the same elements of the former business defense.

tral employment qualifications essential to the employer's business." *Western Air Lines, Inc.*, v. *Criswell*, 472 U.S. 400, 411 (1985).

The BFOQ defense has been narrowly construed, *Dothard*, 433 U.S. at 334, but it is not so narrow as to preclude employers, in their "normal operations," from considering anything but their products, or anyone but their immediate employees.

> The other key words of the defense, "normal operation" should dispel concern that consideration of all interests other than the employer's interest in selling a quality product at the lowest possible price is precluded . . . . To confine the occupational qualification defense to concerns with price and product quality would deny a defense to Johnson Controls even if the company excluded only pregnant women, as distinct from all women who might become pregnant, from making batteries. . . .

Johnson Controls, 886 F.2d at 903-04. (Posner, J., dissenting).

A. Consideration Of The Interests Of Third Parties Is Permissible In BFOQ Analysis.

This Court has frequently considered the interests of third parties when utilizing the BFOQ defense. *See Dothard* v. *Rawlinson*, 433 U.S. 321 (1977) (considering the safety of the inmates and other personnel in upholding a state regulation barring the hiring of women guards for "contact positions" at the all-male prisons). In *Dothard*, this Court stated that "more is at stake in this case, however, than an individual woman's decision to weigh and accept the risks of employment . . ." *Id.* at 335. What "more" was at stake was "the basic control of the penitentiary and *protection of its inmates and the other security personnel.*" *Id.* at 336 (emphasis added). *See also Western*

Air Lines v. *Criswell*, 472 U.S. 400 (1985) (considering the safety interest of the flying public in assessing the airline's age 60 retirement requirement for flight engineers).

It has been argued that child protection policies cannot come under the BFOQ defense because these policies do not address the employee's "ability or inability to perform the work."[16] Such a narrow reading is not correct. Not only did the lower court find that child protection policies could come within the BFOQ defense,[17] but two of the dissenters in the case also agreed that these policies and the employer's concern for the interests of third parties would be within the "normal operations" of the business.

> The [BFOQ] defense is applicable to this case and although it is of limited scope it is not the proverbial eye of a needle. In particular the "normal operation" of a business encompasses ethical, legal, and business concerns about the effects of an employer's activities on third parties. An employer might be validly concerned on a variety of grounds both practical and ethical with the hazards of his workplace to the children of his employees.

Johnson Controls, 886 F.2d 871, 904 (Posner, J., dissenting).

> [T]he BFOQ defense need not be narrowly limited to matters of worker productivity, product quality and occupational safety. The employer may permissibly consider the possible risks to (even potential) third parties in the normal course of business decision making.

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[16] *Johnson Controls*, 886 F.2d at 909. (Easterbrook, J., dissenting).

[17] *Id.* at 893.

Id. at 901-2, n.1 (Cudahy, J., dissenting). The EEOC also concurred with that opinion.[18]

Employers must be able to take the safety interests of third parties into consideration as being "reasonably necessary to the normal operations." If in the present situation employers in a hazardous industry could not consider the safety of an unborn child as part of their normal operation, then, as Judge Posner states:

> To confine the occupational qualification defense to concerns with price and product quality would deny a defense to [the employer] even if the company excluded only pregnant women, as distinct from all women who might become pregnant, from making batteries.

886 F.2d at 903-04 (Posner, J., dissenting). The ironic outcome would then be that the PDA which was enacted to help shield unborn children by providing suitable work and income for their mothers, would be used as a sword against the children by allowing them to be exposed to toxic hazards. This simply would not be consistent with society's and the government's stated interest in protecting unborn children.

B. Increasing Recognition Of the Interests Of Unborn Children Regarding Birth Defects And Life Itself, By Society And Government, Justifies Consideration Of Those Interests By Employers In Voluntarily Considering Workplace Qualifications.

This Court has consistently recognized the State's "strong interest in protecting the potential life of the

[18] EEOC *Policy Guide*, at 405:6801 (Jan. 24, 1990).

fetus." *Maher* v. *Roe*, 432 U.S. 464, 478 (1977),[19] and it would be a strange anomaly that, as society and the law increasingly recognize the interests of unborn children, an employer would be precluded from doing the same. Not only is there widespread demand for more adequate legal protection of unborn life, and more latitude from this Court for that legal protection by states, but property, tort, criminal and other branches of law are giving more protection to unborn life.

Early on the interests of unborn children were recognized in the areas of property[20] and inheritance.[21] Increasingly, the interests of unborn children are being recognized and protected. Before 1946, tort law rarely allowed recovery for a child who was injured in utero and was subsequently born alive.[22] One of the reasons was that "the defendant could owe no duty of conduct to a person who was not in existence at the time of the inju-

[19] *See also Webster* v. *Reproductive Health Services*, 492 U.S. ____, 106 L.Ed 2d 410, 434 109 S. Ct. ____ (1989); *Thornburgh* v. *American College of Obstetricians & Gynecologists*, 476 U.S. 747, 770 (1986); *City of Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 428 (1983); *Harris* v. *McRae*, 448 U.S. 297, 313 (1980).

[20] The Restatement (Second) of Property § 1.4 comment d (1983) states:

> d. *Vesting of interest in child in gestation.* A child in gestation who is later born alive is considered a life in being during the period of gestation in determining whether such child's interest in property meets the vesting requirement of the rule against perpetuities.

[21] The Uniform Probate Code § 2-108 (1969) states:

> Relatives of the decedent conceived before his death but born thereafter inherit as if they had been born in the lifetime of the decedent.

[22] *See* W. Keeton, D. Dobbs, R. Keeton, D. Owen, *Prosser and Keeton on the Law of Torts*, § 55, 367 (5th Ed. 1984).

rious action."[23] But now a legal duty to the unborn child is increasingly acknowledged. In every jurisdiction a child, if born alive, can maintain an action for the consequences of prenatal injuries, and a wrongful death claim will lie if the child subsequently dies of the injuries.[24] Further, courts are increasingly allowing actions where the harmful contact with the mother occurs before the child's conception.[25]

While many of the prenatal and preconception injury causes of action turn on whether the child is born alive, a majority of states now allow wrongful death claims by the estates of children who died before birth,[26] thereby

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[23] *Id.*, (*citing*, *Dietrich* v. *Inhabitants of Northampton*, 138 Mass. 14, 17 (1884)).

[24] *Prosser and Keeton on the Law of Torts*, at 368. *See also* Exodus 21:22.

[25] *See Bergstresser* v. *Mitchell*, 577 F.2d 22 (8th Cir. 1978) (courts of Missouri would permit an infant born alive to bring an action for injuries arising out of preconception negligent conduct); *Jorgensen* v. *Meade Johnson Laboratories, Inc.*, 483 F.2d 237 (10th Cir. 1973) (chromosomal damages to mother's ovum from taking a defective drug); *Renslow* v. *Mennonite Hospital*, 67 Ill.2d 348, 10 Ill.Dec. 484 367 N.E.2d 1250 (1977) (infant can maintain action for injuries sustained as result of negligent transfusion even though it occurred several years before conception); *Enright* v. *Eli Lilly & Co.*, 155 App.Div.2d 64, 553 N.Y.S.2d 494 (1990); (cause of action will lie for granddaughter of woman who ingested DES during the pregnancy of the claimant's mother).

[26] *See Eich* v. *Town of Golf Shores*, 293 Ala. 95, 300 So.2d 354 (1974); *Summerfield* v. *Superior Court In and For Maricopa County*, 144 Ariz. 467, 698 P.2d 712 (1985); *Hatala* v. *Markiewicz*, 26 Conn.Supp. 358, 224 A.2d 406 (1966); *Worgan* v. *Greffo and Ferrara, Inc.*, 128 A.2d 557 (Del. Super. 1956); *Simmons* v. *Howard Univ.*, 323 F.Supp. 529 (D.D.C. 1971); *Porter* v. *Lassiter*, 91 Ga.App. 712, 87 S.E.2d 100 (1955); *Chrisafogeorgis* v. *Brandenberg*, 55 Ill.2d 368, 304

clearly indicating that the child's interest arises and becomes valid *before* birth.

Similar advances are underway in criminal law, as more states consider fetuses as "persons" under their homicide statutes.[27]

As society and the courts increasingly recognize the interests of unborn children, it would be unjust not to permit employers to do the same. Tort law has acknowledged that employers have a legal duty to unborn chil-

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N.E.2d 88 (1973); *Britt* v. *Sears*, 150 Ind.App. 487, 277 N.E.2d 20 (1972); *Hale* v. *Manion*, 189 Kan. 143, 368 P.2d 1 (1962); *Mitchell* v. *Couch*, 285 S.W.2d 901 (Ky. 1955); *Wascom* v. *American Indemnity Corp.*, 383 So.2d 1037 (La.App.1980); *Odham* v. *Sherman*, 234 Md. 179, 198 A.2d 71 (1964); *Mone* v. *Greyhound Lines, Inc.*, 368 Mass. 354, 331 N.E.2d 916 (1975); *O'Neill* v. *Morse*, 385 Mich. 130, 188 N.W.2d 785 (1971); *Verkennes* v. *Corniea*, 229 Minn. 365, 38 N.W.2d 838 (1949); *Rainey* v. *Horn*, 221 Miss. 269, 72 So.2d 434 (1954); *O'Grady* v. *Brown*, 654 S.W.2d 904 (Mo. 1983); *White* v. *Yup*, 85 Nev. 527, 458 P.2d 617 (1969); *Poliquin* v. *MacDonald*, 101 N.H. 104, 135 A.2d 249 (1957); *Salazar* v. *St. Vincent Hosp.*, 95 N.M. 150, 619 P.2d 826 (1980); *Hopkins* v. *McBane*, 359 N.W.2d 862 (N.D. 1984); *Werling* v. *Sandy*, 17 Ohio St.3d 45, 476 N.E.2d 1053 (1985); *Evans* v. *Olson*, 550 P.2d 924 (Okl. 1976); *Libbee* v. *Permanente Clinic*, 268 Or. 258, 518 P.2d 636 (1974); *Amadio* v. *Levin*, 509 Pa. 199, 501 A.2d 1085 (1985); *Presley* v. *Newport Hosp.*, 117 R.I. 177, 365 A.2d 748 (1976); *Fowler* v. *Woodward*, 244 S.C. 608, 138 S.E.2d 42 (1964); *Vaillancourt* v. *Medical Center Hosp of Vt. Inc.*, 139 Vt. 138, 425 A.2d 92 (1980); *Moen* v. *Hanson*, 85 Wash.2d 597, 537 P.2d 266 (1975); *Baldwin* v. *Butcher*, 155 W.Va. 431, 184 S.E.2d 428 (1971).

[27] *See* Cal. Penal Code § 187 (West Supp. 1986); Ill. Ann. Stat. ch. 38, § 9-1.2 (Smith-Hurd Supp. 1990); Iowa Code Ann. § 707.7 (West 1979); Mich. Comp. Laws Ann. § 750.322 (West 1968); Miss. Code Ann. § 97-3-37 (1973); N.H. Rev. Stat. Ann. § 585:13 (1974); Okla. State Ann. title 21, § 713 (West 1983); Utah Code Ann. § 76-5-201 (Supp. 1989); Wash. Rev. Code Ann. § 9A32.060 (1988); Wisc. Stat. Ann § 940.04 (West 1982).

dren, and, while it is the rule that economic factors may not alone justify a BFOQ defense, as the Government points out in its brief" "[t]he existence of a reasonably perceived legal obligation is distinct from a justification resting solely on economic or solely on moral concerns." Government Br. at 16-17 n. 13.

C. Policies Which Protect Unborn Children From Birth Defects Are BFOQs, Particularly When Reduction Of Employer Liability Is Involved.

Title VII may not allow a cost justification defense for a discriminatory policy, *Los Angeles Dep't of Water & Power* v. *Manhart*, 435 U.S. 702, 716 (1978), but this cannot preclude employers from considering the effect their product or its production may have on third parties as one of many factors in making business decisions which are "reasonably necessary to the normal operations of the particular business." Judge Posner has warned in his dissent that "[w]e should not dismiss the concerns over tort liability as a narrow, selfish bottom line concern irrelevant to the purposes of Title VII." *Johnson Controls*, 886 F.2d at 905 (Posner, J., dissenting). He went on to say that the potential tort liability was an estimation of the cost to the child for suffering the prenatal injury and "[t]hat is a social cost that Title VII does not require a company to ignore." *Id.*

As society's interest in the unborn child and the child's interest itself is increasingly recognized in the legal field (*see* p. 14, *supra*), employers must be able to consider what effect future liability may take. To do otherwise would be to place the employer in a position whereby, ignoring the growing legal duty to the child, employers open themselves up to litigation in the future, and as Judge Posner explained:

> Such a suit would not be preempted by worker's compensation law because the plaintiff would not be the worker. The employer would therefore be exposed to full common law damages, punitive as well as compensatory. The mother's own negligence—for if she had been clearly warned of the hazard, but voluntarily became pregnant anyway and continued to work making batteries, she would be acting negligently with regard to the fetus—would not be imputed to the child and therefore would not reduce the employer's liability [cites omitted]. It would merely make the mother a joint tortfeasor with the employer. Moreover, she might not be negligent; the pregnancy might be involuntary, and lead can injure the fetus before the mother knows she is pregnant.

Johnson Controls, 886 F.2d at 904-05 (Posner, J., dissenting).

At least one suit of this nature has been tried. *See Security National Bank* v. *Chloride, Inc.*, 603 F.Supp. 294 (D.Kan. 1985) (Child sued battery manufacturer for prenatal injuries due to lead exposure). In the *Chloride* case, the child lost, but the fact is, with every jurisdiction allowing causes of action for prenatal injuries, the potential liability is there. As a society we must encourage offensive rather than defensive measures, stopping damage before it occurs rather than recalling products and defending tort litigations after the fact.

Taking this offensive is difficult in the present situation because of the balancing of the competing interests involved. The course is a difficult one to chart but the courts of appeals which have been faced with the challenge have created a test which adequately balances all of the interests involved and assures that the policy is narrowly tailored to infringe on the fewest rights. (p. 21, *infra*.)

III. THE FEDERAL COURTS OF APPEALS THAT HAVE ADDRESSED EMPLOYER POLICIES THAT PROTECT UNBORN CHILDREN FROM BIRTH DEFECTS HAVE FOUND THE POLICIES CONSISTENT WITH TITLE VII

With the infinite variety of factual situations Title VII cases can have, this Court has consistently urged a flexible approach to interpreting Title VII cases. *See Furnco Construction Corp.* v. *Waters*, 438 U.S. 567, 575-77 (1978); *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977).[28] As both the Fourth Circuit and the EEOC have recognized, child protection policies do not fall squarely within the Title VII framework and therefore require a flexibility in the application of the Title VII theories.

> We must start by conceding that the fact situation [the child protection policy] presents does not fit with absolute precision into any of the developed theories . . . . That there would be such fact situations in Title VII litigation has always been recognized by the Supreme Court as it has developed and applied the different theories. The Court has continually admonished, [cites omitted] and indeed demonstrated in its own decisions, [cites omitted] that these theories were not expected nor intended to operate with rigid precision with respect to the infinite variety of factual patterns that will emerge in Title VII litigation.

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[28] *See also Western Air Lines* v. *Criswell* where this Court explained the need for a flexible approach to the application of the BFOQ under the ADEA.

> The diverse employment situations in various industries, however, forced Congress to adopt a "case-by-case basis . . . as the underlying rule in the administration of the legislation." [Cite omitted]. *Congress offered only general guidance on when an age classification might be permissible by borrowing a concept and statutory language [BFOQ defense] from Title VII of the Civil Rights Act of 1964.*

Id. 472 U.S. at 411-12 (emphasis added).

Wright v. *Olin Corp.*, 697 F.2d 1172, 1184 (4th Cir. 1982).

> These cases do not fit neatly into the traditional Title VII analytical framework and, therefore, must be regarded as a class unto themselves.

EEOC, *Policy Statement* at 405:6615 n.11 (Oct. 3, 1988).

Various federal courts of appeals and the EEOC have addressed the issue of child protection policies and their relation to Title VII, all concluding that these policies are permitted under Title VII.[29] Though the courts differ in their analyses, the elements or questions are basically the same:

1) That there is a substantial risk of harm to the employees' offspring through workplace exposure to toxic hazards;

2) the transmission of that harm to offspring is confined substantially to employees of one sex; and

3) there are no adequate but less discriminatory alternatives to the employer's policy.[30]

These elements appropriately balance the interests of all parties involved—the employer, the employee and the unborn and future offspring. The courts have consistently required that proof of the risk to the unborn and proof that the risk is transmitted through one parent be objective.

> The employer must produce objective evidence of an essentially scientific nature supported by the opinion evidence of qualified experts in the relevant scientific fields. The employer need not prove the existence of a general consensus on the points within the qualified

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[29] *See* n. 13, *supra*.

[30] *Wright*, 697 F.2d at 1190-92; *Hayes*, 726 F.2d at 1548, 1552-53; *Johnson Controls*, 886 F.2d at 885; EEOC *Policy Guide*, at 405:6802 (Jan. 24, 1990).

> scientific community. Rather, the employer carries its burden by showing that the body of opinion believing that significant risk exists is so considerable that an informed employer could not responsibly fail to act on the assumption that this opinion might be the accurate one.

Hayes v. *Shelby Memorial Hospital*, 726 F.2d 1543, 1548 (1984) (citing *Wright* v. *Olin Corp.*, 697 F.2d 1172, 1191, 1196 (1982)). Using this formulation, the lower court found that:

> [t]he overwhelming medical and scientific research data demonstrating a substantial risk to the unborn child from lead exposure, found in the record and set forth in Section II, *supra*, approaches a general consensus within the qualified scientific community, and certainly suffices to show that within that community there is a considerable body of opinion that significant risk exists.

Johnson Controls, 886 F.2d at 889.[31]

With regard to the evidence that the risk is substantially transmitted through women, the lower court found that "the evidence of risk to the unborn child resulting from exposure of the father to the lead levels currently present in the Johnson Control's battery manufacturing factories is, at best, speculative and unconvincing." *Id.* There has been much criticism of the medical community because the research on lead exposure has focused on women and the effects on their offspring, while ignoring the effects of lead exposure on the male reproductive system and the effects it might have on the male's offspring.[32] This lack of research should not, however, lead us to ignore the clear evidence of the effect on unborn children that comes from direct maternal exposure to lead merely because it might lead to differential treatment in the workplace. Instead, the logic of the *Hayes* court should be adopted.

> In those instances in which scientific evidence points to a hazard to women, but no scientific evidence exists regarding men, an employer may be allowed to adopt a suitable policy aimed only at women. As additional research on men becomes available, however, the employer must adjust the policy or risk running afoul of Title VII.

Hayes, 726 F.2d at 1549.

CONCLUSION

Based on the record, this Court should affirm the decision of the Seventh Circuit Court of Appeals, granting summary judgment to Johnson Controls and upholding its policy which protects unborn children from birth defects. The child protection policy in this case is not artificial, arbitrary or unnecessary. It narrowly applies only to those jobs which would expose women, their unborn and future children to lead levels that have been clearly shown to cause damage to the unborn child. This type of policy does not violate Title VII as it is based upon objective medical evidence, not myths or stereotypes.

The policy is also consistent with society's and the legal system's increasing awareness and recognition of the interests of unborn children. It has been said that "justice requires that the principle be recognized that a child has

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[31] In addition, the parties in this case agree that there is a substantial risk to the unborn child from exposure to lead. *See Johnson Controls*, 886 F.2d at 879 (*citing* the appellate briefs of the UAW and Johnson Controls).

[32] *Firing the Woman to Protect the Fetus:*, 69 Geo. L.Rev. at 661; *Hayes*, 726 F.2d at 1549.

the legal right to begin life with a sound mind and body."[33] Child protection policies analyzed under the standard created and used by the Courts of Appeals and endorsed by the EEOC will do just that, while at the same time protecting women from arbitrary application of child protection policies in other industries where no proof of danger has been shown.

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[33] *Smith* v. *Brennan*, 31 N.J. 353, 364, 157 A.2d 497, 503 (1960).